No. 79-2065

In the Supreme Court of the United States

OCTOBER TERM, 1979

LEONARD HORWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 3731 authorized an appeal by the government from the district court's order excluding the testimony of a prosecution witness unless two prospective defense witnesses were granted immunity.

2. Whether the government was constitutionally required to grant immunity to prospective defense witnesses.

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The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 622 F. 2d 1101. The opinion of the district court (Pet. App. 11a-26a) is reported at 476 F. Supp. 775.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1980. The petition for a writ of certiorari was filed on June 27, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on nine counts of securities fraud, in violation of 15 U.S.C. 77q(a) and 77(x), one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371, and one count of endeavoring to obstruct a grand jury investigation, in violation of 18 U.S.C. 1503.[1] After the return of the jury's verdict, the district court granted petitioner's motion for a new trial at which the testimony of an immunized government witness would be excluded unless two prospective defense witnesses were also granted immunity (Pet. App. 11a-26a). On the government's appeal pursuant to 18 U.S.C. 3731, the court of appeals reversed the order excluding the testimony of the government witness and remanded to the district court for further proceedings (Pet. App. 1a-10a).

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[1]Two of petitioner's co-defendants, Eliot Weisman and Salvatore Cannatella, were also convicted, and their convictions were affirmed by the court of appeals. See *United States* v. *Weisman*, Nos. 79-1315, 79-1318 (2d Cir. Apr. 4, 1980). Weisman's petition for a writ of certiorari is currently pending (No. 80-62 (filed July 10, 1980)). Four other defendants entered guilty pleas to various charges, and two defendants were acquitted.

1. The evidence at trial is set forth in the opinion of the court of appeals in *United States* v. *Weisman*, Nos. 79-1315, 79-1318 (2d Cir. Apr. 4, 1980), petition for cert. pending, No. 80-62 (filed July 10, 1980). In brief, the trial evidence showed that petitioner, along with co-defendants Eliot Weisman, Salvatore Cannatella, Gregory DePalma, Richard Fusco, Murad Nersesian, Louis Pacella, Laurence Goodman, Thomas Marson, and Anthony Gaggi engaged in an extensive scheme to defraud investors in connection with the Westchester Premier Theatre, a live-entertainment facility in Westchester County, New York. The scheme involved a fraudulent public offering of common stock and a subsequent skimming operation in which certain defendants drained off large portions of the Theatre's proceeds. These actions eventually forced the Theatre into bankruptcy, during which the skimming continued. Finally, petitioner and Weisman attempted to obstruct a grand jury investigation into the operations of the Theatre (80-62 Pet. App. A4-A5).

With respect to petitioner's complicity, the proof centered primarily upon his role in bribing Jay Emmett and Solomon Weiss, two executives of Warner Communications, Inc., to cause Warner to purchase $250,000 of Theatre stock and to give the Theatre an additional $50,000, $30,000 of which was purportedly to cover legal services for Warner that had not in fact been performed. In return, Emmett and Weiss were paid $70,000 by the conspirators and were promised added funds in the future (Pet. App. 3a-4a, 16a-18a; 80-62 Pet. Supp. App. B-15). Petitioner also attempted to prevent the grand jury from learning of his dealings with Emmett and Weiss by suggesting that false billings be created for the legal work supposedly done for Warner and that the grand jury be told "any cockamayme" (Tr. 1441, 1738-

1745, 1747-1748, 2649-2654, 2656-2658, 2670-2672);[2] petitioner understood that the Warner people would tell investigators that the work had been done and paid for and that they had no records (Govt. Exh. 4L). In addition, petitioner recommended that the conspirators "should keep in close contact so that they could get together on their grand jury stories if something were to happen" (Pet. App. 19a).[3]

The government's evidence against petitioner principally consisted of 20 consensually recorded conversations, approximately 140 documentary exhibits, and the testimony of three accomplices—Norman Brodsky, Bruce Kosman, and Charles Ross Carino. In return for the witnesses' cooperation in the investigation and trial of this case, the government agreed that Brodsky would not be prosecuted for any criminal offense arising out of his participation in the Theatre's affairs and that Kosman and Carino would receive favorable plea arrangements (Pet. App. 3a, 14a-15a & nn.6, 7, 18a-20a).

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[2]The citations herein to the record are taken from the government's brief in the court of appeals. "Tr." refers to the transcript of the trial in the instant case; "Govt. Exh." refers to the government's exhibits at trial; and "App." refers to the appendix in the court of appeals.

[3]The evidence further showed that petitioner gave Norman Brodsky $15,000 to purchase 2,000 shares of Theatre stock in nominee names in order to suggest that there was legitimate public interest in the stock (Tr. 1553-1554, 1679-1680, 2199, 2256). Petitioner also induced Harry Lipsig to purchase 1,500 shares of Theatre stock by promising him an additional 1,500 shares at no cost (Tr. 928, 2467-2470). Similarly, petitioner promised Aaron Gottesman, his accountant, that he would be reimbursed after the public offering if he would buy 1,000 shares of Theatre stock for $7,500; pursuant to this arrangement, petitioner later paid Gottesman $7,500 for the 1,000 shares, which were then worth no more than $1,000 (Tr. 927-928, 1620-1621, 1679-1680, 2121; see also Pet. App. 17a & n.9). Finally, petitioner also promised to purchase a life insurance policy from Malcolm Tarlov if Tarlov would buy 1,000 shares of Theatre stock for $7,500. After Tarlov made the purchase, the Theatre bought an insurance policy on Weisman's life, and Tarlov received a $5,000 commission (Tr. 1683, 2415-2426, 2458-2459; see also Pet. App. 18a).

2. At the close of the government's case at petitioner's first trial, he requested that the court grant immunity to the Warner executives, Emmett and Weiss, on the ground that their testimony would exculpate him. In the alternative, petitioner sought to introduce their grand jury testimony. The district court denied the latter request but did not rule directly on the former. A mistrial was eventually declared when the jury was unable to reach a verdict (Pet. App. 4a-5a, 13a).

At his re-trial, petitioner subpoenaed Emmett and Weiss, but each asserted his privilege against self-incrimination and refused to testify.[4] Upon inquiry by the court, the government declined to grant immunity to Emmett and Weiss because they were the subjects of a continuing investigation (Pet. App. 5a, 13a).

After petitioner was convicted, he moved for a new trial on the ground, *inter alia*, that the government had violated due process by granting immunity to Brodsky but not to Emmett and Weiss. The district court agreed, concluding that the government's refusal to give use immunity to these witnesses because they were under continuing investigation, while at the same time granting Brodsky a broad transactional immunity, deprived petitioner of a fair trial. Accordingly, it ordered a new trial at which Brodsky's testimony would be excluded unless use immunity were granted to petitioner's two witnesses (Pet. App. 2a, 5a, 23a, 25a).

Pursuant to 18 U.S.C. 3731, the government appealed the suppression of Brodsky's testimony. The court of

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[4]Toward the conclusion of the government's case, petitioner requested a hearing to determine that Emmett and Weiss would invoke the Fifth Amendment if called as witnesses at trial. This hearing was held outside the presence of the jury, and Emmett and Weiss each testified that he would assert his Fifth Amendment privilege (Tr. 3276, 3708-3711, 3870-3871).

appeals held that its recent decision in *United States* v. *Turkish*, Nos. 79-1326, 79-1396 (2d Cir. May 27, 1980) (Pet. App. 27a-51a), had "significantly undercut the analytical foundation" of the district court's order (Pet. App. 9a). Accordingly, it remanded the case to the district court for reconsideration under *Turkish*. The court also suggested that if, as seemed likely, petitioner's claim for immunization of Emmett and Weiss were found to lack merit on remand, the district court should also reconsider its grant of a new trial to petitioner (*id.* at 9a-10a).

ARGUMENT

1. Review of the instant case by this Court would be premature at this time. The court of appeals has remanded to the district court for further consideration of the questions whether petitioner's witnesses should be granted use immunity and whether the order granting a new trial should be withdrawn. Assuming that the government prevails on remand, it remains for petitioner to be sentenced, following which he may appeal his convictions, raising any other objections that he may have as to the conduct of the trial. Such an appeal may result in reversal of his convictions on some other grounds. If the convictions are affirmed, he may seek review from this Court at that time, presenting all his claims in the context of a final judgment.

2. In any event, petitioner's claims are without merit.

a. First, petitioner asserts (Pet. 25-26) that 18 U.S.C. 3731 does not authorize the appeal taken by the government from the district court's order excluding Brodsky's testimony at the retrial unless Emmett and Weiss were granted immunity. Although this assertion is presented without elaboration, petitioner apparently claims that the order was not appealable because "no testimony was actually suppressed at the time of the

appeal" (Pet. 25). The court of appeals correctly rejected this contention (Pet. App. 6a-8a).[5]

By its terms, Section 3731 is to be "liberally construed to effectuate its purposes" (18 U.S.C. 3731). Cf. *United States* v. *Helstoski*, 442 U.S. 477, 487 n.6 (1979). As the court of appeals explained (Pet. App. 6a), "those purposes certainly include permitting the government to appeal immediately from adverse pretrial rulings suppressing or excluding evidence." Moreover, if the court's ruling had not been appealed when it was, the exclusion of Brodsky's testimony would never have been subject to appellate review, "a situation which section 3731 was designed to prevent" (Pet. App. 8a). The courts of appeals have previously held such orders to be appealable, and petitioner has cited no authority to the contrary. See, *e.g.*, *United States* v. *Cannone*, 528 F. 2d 296, 298 (2d Cir. 1975); *United States* v. *Battisti*, 486 F. 2d 961, 966-967 (6th Cir. 1973); cf. *United States* v. *Beck*, 483 F. 2d 203, 206 (3d Cir. 1973), cert. denied, 414 U.S. 1132 (1974).

In the present case, although the district court's order of exclusion was conditional and could have been avoided had the government elected to surrender its rights, "the government, the defense, and the district court have embarked upon a collision course that will almost certainly result in the suppression of the Brodsky testimony" (Pet. App. 8a). These are precisely the kinds of circumstances in which 18 U.S.C. 3731 was intended to be "liberally construed" to authorize an appeal.

b. On the merits, petitioner contends (Pet. 15-24) that his due-process right to a fair trial was violated by the government's grant of immunity to Brodsky but not to Emmett and Weiss. However, the courts of appeals have

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[5]The district court also concluded (Pet. App. 25a n.17) that its order was appealable under 18 U.S.C. 3731.

consistently rejected the claim that defense-witness immunity is constitutionally required to provide a fair trial, to effectuate the defendant's right to compulsory process under *Washington* v. *Texas*, 388 U.S. 14 (1967), or to avoid "the suppression by the prosecution of evidence favorable to an accused" under *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), and it is now well settled that a criminal defendant has no general right to obtain immunity for defense witnesses. See, *e.g.*, *United States* v. *Turkish*, *supra*; *United States* v. *Lenz*, 616 F. 2d 960 (6th Cir. 1980); *United States* v. *Gleason*, 616 F. 2d 2, 27-28 (2d Cir. 1979), cert. denied, No. 79-1118 (Feb. 19, 1980); *United States* v. *Klauber*, 611 F. 2d 512, 517 n.11 (4th Cir. 1979), cert. denied, No. 79-1229 (Apr. 21, 1980); *United States* v. *Herman*, 589 F. 2d 1191, 1200 (3d Cir. 1978), cert. denied, 441 U.S. 913 (1979); *United States* v. *Lang*, 589 F. 2d 92, 95-97 (2d Cir. 1978); *United States* v. *Rocco*, 587 F. 2d 144, 146-148 (3d Cir. 1978); *United States* v. *Carman*, 577 F. 2d 556, 561 (9th Cir. 1978); *United States* v. *Benveniste*, 564 F. 2d 335, 339 n.4 (9th Cir. 1977); *In re Daley*, 549 F. 2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F. 2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F. 2d 1333, 1356 n.115 (D.C. Cir. 1974); *United States* v. *Smith*, 436 F. 2d 787, 790 (5th Cir.), cert. denied, 402 U.S. 976 (1971); *Earl* v. *United States*, 361 F. 2d 531 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967) (transactional immunity). See also *McCray* v. *Illinois*, 386 U.S. 300, 314 (1967).[6]

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[6]We note that Department of Justice guidelines provide for the granting of immunity to defense witnesses "in extraordinary circumstances where the defendant plainly would be deprived of a fair trial without such testimony." *United States Attorneys' Manual* §1-11.230, at 13 (Jan. 14, 1977); see also *id.* at 15. In addition, various informal agreements, such as those made with Kosman and Carino in the present case, may be arranged with the defendant and his witnesses. See *United States* v. *Wright*, 588 F. 2d 31, 36 (2d Cir. 1978), cert. denied, No. 78-1065 (Feb. 21, 1979) ("letter immunity" offered to defense witness).

This line of decisions rests on compelling grounds. To require the government to grant immunity to defense witnesses would intrude upon the exclusive authority of the Executive Branch over the initiation of criminal prosecutions. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 124-125 (1979); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977). The use of immunity is an integral aspect of this Executive responsibility. See *Ullmann* v. *United States*, 350 U.S. 422, 431-434 (1956).

Moreover, as a practical matter, compulsory use immunity for a defense witness would often preclude charges from being brought against that witness. In prosecuting one who has previously given immunized testimony, the government's "burden of proof * * * is not limited to a negation of taint * * * [but instead] imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972). Where the government is unable to meet this "heavy burden" (*id.* at 461), as will frequently be the case, use immunity would effectively foreclose prosecution of the witness and thus would be tantamount to transactional immunity. This difficulty is exacerbated by the fact that the judicial process is ill-suited to consideration of the myriad factors that are raised by a grant of immunity—for example, the trade-off between proceeding against a potential defendant and granting immunity in order to obtain evidence against others; the critical timing of an offer of immunity to allow the completion of other investigations and the preservation of those results for future prosecutions; the feasibility of assigning different prosecutors to various cases in order to segregate the fruits of the immunity grant; and the terms and scope of

the proffered immunity.[7] See *Ullmann* v. *United States, supra,* 350 U.S. at 431-434; cf. *United States* v. *Lovasco, supra*, 431 U.S. at 790-796.

In addition, the position urged by petitioner would be subject to substantial abuse. In seeking immunity for their witnesses, defendants would neither be motivated by the broader public interest that is of concern to prosecutors in granting immunity nor constrained by the sorts of institutional and public checks that are applicable to government attorneys. To the contrary, defense-witness immunity would "empower [the defendant] to give his confederates an immunity bath" (*In re Kilgo*, 484 F. 2d 1215, 1222 (4th Cir. 1973)) and, because of the difficulty of proving perjury in many instances, it would encourage false testimony and distort the fact-finding process. Such immunity might also serve to disrupt the proper operation of the criminal justice system by facilitating the defendant's ability to gain a severance from co-defendants, thereby preventing the occurrence of joint trials.

Petitioner seeks to answer these concerns by asserting the unfairness of allowing the government to grant immunity to its own witnesses but to decline to immunize those called by the defendant. However, this argument overlooks the fundamental differences between the prosecution and the defense. The government bears the

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[7]In the instant case, government witness Brodsky, Kosman, and Carino were each offered differing inducements for their cooperation and testimony (see page 3, *supra*). We note that none of these witnesses was given formal use immunity under 18 U.S.C. 6002. Moreover, the arrangements with these witnesses, which were reached only after their factual accounts had been corroborated, were subject to the conditions that their testimony be truthful and that they not commit any further crimes (Tr. 1089-1091, 2927-2928; Govt. Exhs. 6HHHH, 14TT; App. 53-56).

burden of persuading a unanimous jury of the defendant's guilt beyond a reasonable doubt. The defense, on the other hand, may refrain from presenting any evidence at all and can rest solely on the government's failure to meet its burden of proof. Moreover, the Double Jeopardy Clause limits the government to one opportunity to convict the defendant and generally forecloses appellate review of trial errors that work to the defendant's benefit. The government also cannot compel evidence from the source most knowledgeable about the facts of the case—the defendant himself. Additional protections, such as the *Brady* rule, are also enjoyed by the defense but not by the prosecution.

But beyond the relative balance of advantage, the notion of "unfairness" advanced by petitioner provides an inadequate constitutional standard for compulsory defense-witness immunity. As the court of appeals explained in *United States* v. *Turkish*, *supra* (Pet. App. 43a, 44a):

> [I]n most situations where defense witness immunity is likely to be sought, some legitimate opposing prosecution interest will exist, and constitutional fairness is not a satisfactory standard against which to assess such interests.
>
> * * * [T]he Due Process Clause [does not contain] a general requirement that defense witness immunity must be ordered whenever it seems fair to grant it.

The Third Circuit has reached a like conclusion. See *United States* v. *Bacheler*, 611 F. 2d 443, 450 (3d Cir. 1979) ("Defendants argue that it is 'simply unfair' to permit the prosecutor to prove guilt with immunized [testimony] and deny the same to defendants. This claim does not rise to the level of constitutional deprivation

* * * "). Cf. *United States* v. *Lovasco*, *supra*, 431 U.S. at 795-796.

Nor is a different result suggested by the decision in *Government of the Virgin Islands* v. *Smith*, 615 F. 2d 964 (3d Cir. 1980), upon which petitioner principally relies (Pet. 20-23) both to support his substantive position and to demonstrate the existence of a conflict among the circuits. In *Smith*, a potential defense witness invoked his Fifth Amendment privilege and refused to testify in the defendant's behalf. The local prosecutor, who alone had authority to prosecute the defendant and the witness (both of whom were juveniles), agreed to grant immunity to the witness. Apparently as a courtesy, the prosecutor requested the consent of the United States Attorney. For reasons that were unexplained, the United States Attorney did not concur in the grant of immunity, and accordingly the witness refused to testify for the defendant (615 F. 2d at 967).

In these exceptional circumstances, the court of appeals held that the defendant had demonstrated a *prima facie* claim to immunity for the prospective defense witness, and it therefore remanded the case to the district court for further proceedings. Central to this holding was the court's conclusion that, because the United States Attorney had no jurisdiction with respect to the defendant or the witness, there was no perceptible governmental interest in withholding consent to immunize the witness.[8]

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[8]Thus, the *Smith* analysis fails to support the "selective immunity" theory adopted by the district court in the instant case (Pet. App. 12a, 14a-15a, 23a, 24a, 25a) and advanced by petitioner in this Court (Pet. 2, 9, 10, 17, 23 & n.*). While the district court and petitioner rely heavily on the fact that prosecution witnesses were granted immunity to obtain their testimony, no similar situation was presented in *Smith*, and the court of appeals' decision in that case was not premised on the notion of "selective immunity."

We believe that the Second Circuit in *Turkish* correctly characterized *Smith* as a "totally bizarre situation" and an "extraordinary fact situation * * * [in which] the public interest in not granting defense witness immunity appears to be non-existent" (Pet. App. 34a, 43a; see also *id.* at 44a).[9] While the court in *Turkish* had "no dispute with the holding in *Smith*" (*id.* at 44a; see also *id.* at 47a), it found that decision to be inapplicable where, as in the present case (*id.* at 5a, 13a), the pendency of an investigation concerning the witness established a legitimate public interest militating against the recognition of compulsory defense-witness immunity (*id.* at 47a).[10]

We acknowledge that portions of the opinion in *Smith* can be expansively read to create a broad right to defense-witness immunity. However, we believe it is premature to conclude that *Smith* signals a departure from the unanimous position of the courts of appeals or that the

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[9]We fail to understand the conclusion of the district court (Pet. App. 23a) that the existence of an ongoing investigation concerning Emmett and Weiss weighed in favor of compulsory defense-witness immunity. To the contrary, as the courts of appeals recognized in *Turkish* and *Smith*, the prosecutor's refusal to grant immunity to a prospective defense witness in the absence of such an investigation would generally appear to implicate a diminished governmental interest and to be less justified than in cases where an investigation is underway and a grant of immunity carries a demonstrable potential for thwarting possible criminal prosecution of the defense witnesses.

[10]The alternative holding in *Smith*—that the court may order defense-witness immunity to remedy "prosecutorial misconduct" undertaken " 'with the deliberate intention of distorting the judicial factfinding process' " (615 F. 2d at 968, quoting *United States* v. *Herman*, *supra*, 589 F. 2d at 1204)—has no application in the instant case. See also *United States* v. *Morrison*, 535 F. 2d 223 (3d Cir. 1976). Here, the courts below "expressly reject[ed] any contention that the prosecution had acted in bad faith" (Pet. App. 5a; see *id.* at 14a n.5, 22a-23a), and petitioner has not rested his claim on the "prosecutorial misconduct" analysis of *Smith*, *Herman*, and *Morrison*.

Third Circuit would disagree with the decision below on the facts of this case. The court of appeals in *Smith* expressly limited its holding to "cases where the government can present no strong countervailing interest [to defense-witness immunity]" (615 F. 2d at 973-974). As the Second Circuit explained in *Turkish*, however, the government does have a "legitimate opposing prosecution interest" (Pet. App. 43a) in cases where, as here, the prospective defense witness is the subject of a criminal investigation. By the same token, the court in *Turkish*, after noting its agreement with the specific holding in *Smith* (*id.* at 44a), explicitly reserved the general question of defense-witness immunity in cases in which "the witness is not an indicted defendant and the prosecutor cannot or prefers not to present any claim that the witness is a potential defendant" (*id.* at 47a). In our view, no conflict in the circuits is presented, and, at least until the Third Circuit has clarified the reach of *Smith*, there is no need for this Court to review the issue.[11]

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[11]We note that the Court has recently declined to review the issue of defense-witness immunity. See *United States* v. *Riggs*, 609 F. 2d 1007 (5th Cir. 1979) (table), cert. denied, No. 79-6295 (June 16, 1980); *United States* v. *Klauber*, 611 F. 2d 512 (4th Cir. 1979), cert. denied, No. 79-1229 (Apr. 21, 1980); see also *United States* v. *Praetorius*, 622 F. 2d 1054 (2d Cir. 1979), petition for cert. pending *sub nom. United States* v. *Lebel*, No. 79-6756 (filed June 10, 1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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